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Supreme Court of the United States

No. 200—October Term, 1925.

FRANK MOORE, President of the Odd Lot Cotton Exchange of New York,

Appellant,

vs.

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY, and THE GOLD & STOCK TELEGRAPH COMPANY,

Appellees.

BRIEF FOR APPELLEE, THE NEW YORK COTTON EXCHANGE.

HENRY W. TAFT,
Solicitor for Appellee,
The New York Cotton Exchange.

HENRY W. TAFT,
GEORGE COGGILL,
Of Counsel.

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IN THE

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October Term, 1925, No. 200

FRANK MOORE, President of The Odd-Lot Cotton Exchange of New York,
Appellant,

against

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD & STOCK TELEGRAPH COMPANY,
Appellees.

BRIEF OF THE NEW YORK COTTON EXCHANGE, APPELLEE.

This is an appeal from a final decree of the United States Circuit Court of Appeals for the Second Circuit directing the entry of final judgment in favor of the appellees, dismissing appellant's Amended Bill of Complaint and enjoining the appellant from receiving or using the continuous quotations of the New York Cotton Exchange (R., pp. 69-70).

This decree also affirmed the order of District Judge Learned Hand, which (1) denied appellant's motion for a

preliminary injunction directing appellees to furnish appellant with a ticker and to supply to him the continuous quotations of said Exchange and (2) granted appellees' motion for a preliminary injunction enjoining appellant from receiving or using said continuous quotations.

The opinion of the Circuit Court of Appeals is reported in 296 Fed. Rep. 61 and is printed at page 56 of the Record.

The ground of Federal jurisdiction was that the suit was brought for an alleged violation of the Anti-Trust Laws of the United States (R., p. 2).

The amended Bill of Complaint asked for a decree: (1) adjudging the New York Cotton Exchange to be a monopoly; (2) adjudging that the contract existing between the appellees governing the distribution of continuous quotations be cancelled and declared void on the ground that it violated the Anti-Trust Laws of the United States; (3) granting a mandatory injunction directing the appellees to install in the appellant's exchange a "ticker" and directing them to furnish to the appellant by means of that instrument the continuous quotations of cotton of the appellee Exchange (R., p. 11).

The appellees in their answers denied the right of the appellant to be furnished with ticker service, and denied that appellees were engaged in monopolizing inter-state commerce in cotton or that the contract between the appellee Exchange and the telegraph companies, appellees, was in restraint of trade; and they set up as counterclaims that the appellant was purloining, or receiving from some person who was purloining, the continuous quotations of cotton prices which were the property of New York Cotton Exchange, and demanded that appellant be enjoined from receiving or using said continuous quotations.

Both appellant and appellees made motions for preliminary injunctions as prayed for in their pleadings, and the appellees submitted three affidavits in support of their motion. The motions were heard together before District Judge Learned Hand who denied appellant's motion for preliminary injunction directing the installation of a ticker and the furnishing of continuous quotations and granted appellees' motion for preliminary injunction restraining appellant from receiving or using the continuous quotations. Judge Hand's opinion is reported in 291 Fed. Rep. 681 and is printed at page 50 of the Record.

Appellant appealed from the order entered on Judge Hand's decision to the Circuit Court of Appeals for the Second Circuit. That Court affirmed the order appealed from and, by a decree dated Dec. 21, 1923, directed the District Court to dismiss appellant's Amended Bill of Complaint (R., p. 69). Thereafter the parties entered into a stipulation that the three affidavits submitted in support of appellees' motion should have

> "the force and effect of testimony in support of the counterclaims contained in the answers of defendants-appellees offered at the trial, and that the United States Circuit Court of Appeals for the Second Circuit may direct the entry of such final judgment on said counterclaims as in its opinion the Court below should enter thereon, and that the order and mandate be modified accordingly without prejudice to complainant's right, if any, to appeal to the Supreme Court of the United States" (R., p. 70).

The Circuit Court of Appeals then entered its final order directing that the order of the District Court which had been appealed from be affirmed with costs, that the District Court enter a final decree dismissing the Amended Bill of Complaint and awarding to appellees a final

injunction enjoining and restraining appellant from receiving or using said continuous cotton quotations and that a mandate issue accordingly (R., p. 70). From this decree the appellant appeals to this Court (R., p. 71).

The Pleadings.

Appellant's amended bill of complaint alleges that the three appellees have entered into a contract in restraint of interstate trade and commerce and pursuant thereto refuse to supply appellant with the continuous quotations of the prices at which contracts for the future delivery of cotton are made on the New York Cotton Exchange; that without such quotations appellant is unable to conduct its business of making contracts for the future delivery of cotton on its exchange and that appellees furnish such quotations to all persons of whom appellee New York Cotton Exchange approves but refuse them to appellant in order to prevent it from competing with New York Cotton Exchange (R., pp. 5-6, 9-10). The appellees in their answers admit that they have refused to install a ticker in appellant's Exchange to supply it with these continuous quotations (R., pp. 15, 37). The appellees also admit that they have entered into a contract by which the Western Union Telegraph Company is allowed to furnish the quotations of the New York Cotton Exchange to those only whom said Exchange approves, but they deny that the purpose or effect of the contract is to restrain trade or commerce or prevent competition (R., pp. 20-21, 37-38). The appellee the New York Cotton Exchange also alleges that when it received the application of the appellant for a ticker it made a careful investigation of the character and purposes of appellant and of its members and found that it had been organized to succeed the American Cotton Exchange; that many of the active members of the appellant Exchange had been

active members of the American Cotton Exchange, which had been convicted in the Supreme Court of the State of New York of conducting a bucket shop under Sections 390 and 394 of the Penal Law of that State; that the Odd-Lot Exchange was organized for the purpose of permitting its members to conduct bucket shops under the guise of being members of an Exchange; that for this reason the New York Cotton Exchange refused to permit its quotations to be furnished to appellant and for the further reason that there is no commercial necessity or reason for the existence of a cotton exchange such as appellant's, whereon contracts for the future delivery of cotton in less than 100-bale lots are made and that such an exchange is conducive to improper speculation by persons of small means and inadequate knowledge (R., pp. 21-22).

Appellee New York Cotton Exchange also asserted in its answer that it had the legal right to safeguard its continuous quotations and to refuse to give them to any person who, in its opinion, will not safeguard them or who will misuse them or give them to others who will use them for the purpose of promoting bucket shops or improper speculation and that, upon the question whether any applicant for the quotations desires them for an improper purpose, the judgment of New York Cotton Exchange is final and not subject to judicial review (R., p. 22).

All of the appellees set up as a defense and counterclaim in their answers that, although appellant had been refused permission to use the continuous quotations of New York Cotton Exchange, it was either itself purloining them, or was receiving them from some person who was purloining them, that it was giving them to its members who were distributing them to bucket shops and that this seriously impaired the value of appellees' property in the quotations. Appellees asked for an injunction against appellant to put a stop to this practice (R., pp. 21-23, 38-39).

The fact that the appellant, although not authorized to receive the continuous quotations of the New York Cotton Exchange, is, nevertheless, receiving and displaying them to its members is further established by the affidavits of Hall, Irving, Hale and Burmeister (R., pp. 41-44). Appellant does not deny that it is receiving such quotations, although it does deny that it is "purloining" them or receiving them from some person who is "purloining" them, and claims the right to receive them after they have been given out to those of whom the New York Cotton Exchange approves, on the theory that they then become public property (R., p. 46).

On the amended bill and the affidavit of James Eblin that appellant was in danger of irreparable damage appellant moved for a preliminary injunction directing appellees to furnish it with a ticker and the continuous quotations of the appellee Exchange (R., p. 12). The appellees also moved for a preliminary injunction, restraining the appellant from using or distributing such quotations, on their answers and on the affidavits of Hall, Gardner, Hale and Burmeister and they also submitted in opposition to appellant's motion the affidavit of Mr. Royce (R., pp. 41-44, 47). In opposition to appellees' motion appellant submitted its reply to the answer and counterclaims of the appellees (R., pp. 44-47).

Facts.

The New York Cotton Exchange is a private membership corporation organized under a special Act of the Legislature of the State of New York (Chapter 365 of the Laws of 1871).

Pursuant to the purposes of its incorporation it provides an Exchange Room for the exclusive use of its members where they meet and make contracts for themselves, or as brokers for customers, for the purchase and

sale of cotton for future delivery. These transactions aggregate many million bales of cotton annually. Under the By Laws of the Exchange all contracts are made only in the Exchange Room between 10 A. M. and 3 P. M., and only by open *viva voce* bidding. The quotation or report of the prices, thus established by these contracts, has become a species of property of such value that the Western Union Telegraph Company is willing to and does pay to said Exchange the sum of $27,500, annually, for the privilege of receiving the same and distributing them to those customers of whom the Exchange approves. These quotations are a peculiar kind of property and their value depends on the power to confine their distribution to such Telegraph Companies as will contract with the New York Cotton Exchange therefor and to such customers of the Telegraph Companies as will agree with the Telegraph Companies and the Exchange not to furnish them to others. If any person can promptly acquire these quotations, surreptitiously and without paying therefor, and can give them out to others, the Telegraph Companies would be put at a disadvantage in competing with such persons and would no longer be willing to pay to New York Cotton Exchange the amount now paid to it for the privilege of receiving these quotations (R., pp. 18-19).

Collection and Distribution of Quotations.

Employees of New York Cotton Exchange stationed in its Exchange Room note on slips of paper the price in every purchase and sale made on the Exchange and deliver these slips to a telegraph operator on the floor of the Exchange who transmits the quotations over telegraph wires running through the offices of the Telegraph Company in the City of New York and thence, with the aid of reinforcing instruments, they are automatically trans-

mitted over wires running to many of the cities in the United States. In the City of New York and also in some other large cities the Telegraph Company re-distributes the quotations by the ticker system. This is done by taking the quotations from the Morse telegraph instruments and sending them by a ticker transmitter located in the office of the Telegraph Company over wires to ticker instruments located in the offices of customers. The ticker instrument prints the quotations on an unrolling spool of paper known as a "tape" (R., p. 19).

History of Contract Between New York Cotton Exchange and Western Union Telegraph Company.

Prior to July 14, 1903, the Exchange permitted the Western Union Telegraph Company and the Postal Telegraph-Cable Company to collect quotations through their own employees on the floor of the Exchange and to distribute them to their customers without any restriction. The Telegraph Companies then sold the quotations to all persons desiring them for any purpose. The result was that many persons used them in conducting bucket shops. As a result the bucket shop evil assumed such large proportions that it brought discredit upon the New York Cotton Exchange and its members in the minds of many who ignorantly supposed, from the use of the Exchange's quotations as a basis of the illegal bets in the bucket shops, that the latter were in some way chargeable to the Exchange (R., pp. 19-20).

To remedy this evil, on July 14, 1903, the Exchange withdrew its license to the Telegraph Companies to collect its quotations and distribute them indiscriminately, and adopted certain regulations to prevent the distribution of its quotations to persons conducting bucket shops (R., p. 20).

To accomplish this, the Exchange on July 14, 1903, entered into written contracts with the Western Union Telegraph Company and Postal Telegraph-Cable Company, which, with slight modifications, are now practically the same as the contract, dated April 4, 1922, which is printed as Exhibit A, annexed to the Exchange's answer at pages 23-36 of the Record. This contract provides that the Exchange at its own cost shall collect and furnish its quotations to the Telegraph Company, which may transmit the same to all persons, except those directly or indirectly engaged in the promotion or maintenance of bucket shops or other places, where such quotations are used as a basis for bets or other illegal contracts, based upon fluctuations of the prices of cotton where it is contemplated that such bets or contracts are to be settled with reference to the quotations of any exchange. The contract does not impose the duty of investigating the character of the business of the appellant upon the Telegraph Company, but provides that it shall not furnish the "continuous quotations" of the Exchange to any person until his application therefor has first been approved by the Exchange (R., pp. 20-21). The continuous quotations thus forbidden to be given out without the consent of the Exchange are defined in the contract "to mean every service of quotations wherein the price of cotton shall be quoted oftener than at intervals of fifteen (15) minutes" (R., p. 24). Any quotations other than "continuous quotations" as thus defined can be given out to anyone without the approval of the Exchange (R., p. 21). The contract further provides that each applicant for continuous quotations must sign a form of application in which he agrees not to use them in connection with a bucket shop; that the quotations are for his private use and that he will not give them out to any other person (R., pp. 27-28).

The appellant the Odd-Lot Exchange was organized to conduct business in August, 1922 (R., p. 15). It claims that it operates an exchange in New York City where its members as individuals and as brokers for customers make contracts for the future delivery of cotton in lots of not less than ten bales (R., p. 2). It applied to the Western Union Telegraph Company for a ticker to supply it with the continuous quotation. This application was submitted to the New York Cotton Exchange which, after investigation, came to the conclusion that the Odd-Lot Exchange had been organized to succeed to the business of the American Cotton Exchange which had been put out of business because convicted of conducting a bucket shop. Many of the active members of the convicted Exchange were members of the Odd-Lot Exchange. The New York Cotton Exchange also concluded that the Odd Lot Exchange was organized to enable its members to conduct bucket shops, under the guise of being members of an Exchange, and that there was no commercial reason for the existence of an Exchange whereon contracts were made for the future delivery of cotton in less than 100-bale lots and that the existence of such an exchange would be conducive to improper speculation by persons of small means and inadequate knowledge. The New York Cotton Exchange, therefore, refused to consent to the furnishing of its continuous quotations to appellant (R., pp. 21-22).

The appellant thereupon brought this suit.

This appeal presents three main questions: First: Does the contract between the Telegraph Company and the New York Cotton Exchange violate the Anti-Trust Laws? Second: Is there any other principle of law upon which appellant is entitled to the quotations? Third: Had the Court jurisdiction to entertain appellees' counterclaim?

POINT I.

This suit is not sustainable under the Federal Anti-Trust Laws.

It is not based on the act creating the Federal Trade Commission which provides as the only relief a proceeding before the Federal Trade Commission.

Nor is the suit—except as respects the remedy—based upon the Clayton Act, for the amended bill does not attempt to allege any offense or violation of law created by Sections 2, 3, 7 or 8 of that Act.

Section 16 of that Act does authorize a suit by an individual or corporation for injunctive relief in a Federal Court having jurisdiction of the parties against threatened loss or damage by a violation of the Sherman Act, although the Sherman Act itself sanctioned suits for injunction by the Attorney-General only. This suit, therefore, may not be sustained under the Federal Anti-Trust Laws unless the amended bill shows a violation of the Sherman Anti-Trust Act. That law provides (26 Stat. 209):

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, * * * shall be deemed guilty of a misdemeanor * * *."

The amended bill alleges no act or conduct by any of the defendants, other than the execution of and compliance with the contract respecting the quotations of the

Cotton Exchange, that has any semblance to a contract in restraint of trade or to the monopoly of, or attempt to monopolize, any part of interstate commerce. Thus, as respects the Federal Statutes, the sole question here is, whether this *contract* can be construed as one in restraint of interstate commerce, or an attempt to monopolize any part of that commerce.

The Sherman Act, though an example of terse, lucid and comprehensive diction, necessarily used the most general terms in defining the kind of arrangements it sought to interdict. Thus it uses the phrases "in restraint of trade" and "an attempt to monopolize." The correct meaning of these phrases has been much discussed. Happily the controversy has been put at rest by the decisions of the Supreme Court in

> *Standard Oil Co.* v. *U. S.*, 221 U. S., 1 (1911);
> *U. S.* v. *American Tobacco Co.*, 221 U. S., 106 (1911),

establishing what has come to be known as "the rule of reason."

In the *Standard Oil* case the Court (at p. 58) construed the Sherman Act not as prohibiting acts "which did not unduly restrain interstate or foreign commerce" (at p. 60) but only "contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade", but rather "with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy".

The effect of that decision was "to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute" (at p. 64).

The *American Tobacco* case, in reaffirming the *Standard Oil* case, held (p. 179) "that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose."

The following subsequent cases reinforce these views:

U. S. v. *Union Pacific R. R. Co.*, 226 U. S., 61 (1912);
U. S. v. *Reading Co.*, 226 U. S., 324 (1912);
Nash v. *U. S.*, 229 U. S., 373 (1913);
Eastern States Lumber Ass'n v. *U. S.*, 234 U. S., 600 (1914).

Earlier cases were to the same effect.

U. S. v. *Joint Traffic Ass'n*, 171 U. S., 505 (1898);
Hopkins v. *U. S.*, 171 U. S., 578 (1898);
Anderson v. *U. S.*, 171 U. S. 604 (1898).

In the *Joint Traffic Ass'n* case, this Court said, at page 568:

> "An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

In the *Anderson* case, this Court, in sustaining a rule of an exchange, said, at page 615:

> "Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object. * * * The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public. If an agreement of that nature, while apt and proper for the purpose thus intended, should possibly, though only indirectly and unintentionally, affect interstate trade or commerce, in that event we think the agreement would be good."

The Court also held in the *Anderson* case that the effect on interstate commerce of the rule there in question was "too small to be taken into account (p. 619)." And in *Chicago Board of Trade* v. *U. S.*, 246 U. S., 231 [1918], the Court, in applying the principle of the foregoing cases, held that a rule of the Board of Trade which prohibited its members from bidding from 2 P. M. of one day until 9:30 A. M. on the next day for grain "to arrive" at other than a price fixed by the last trade on a call, was not a violation of the Sherman Act.

Thus the question here is whether the contract between the New York Cotton Exchange and the Telegraph Companies, which provides that the continuous quotations of that Exchange shall be given by the Telegraph Companies only to such persons as the Exchange shall approve, is either a contract in restraint of trade or an attempt to monopolize within the meaning of the Sherman Act.

Is that contract anything more than a normal method of accomplishing the purposes for which the Exchange was organized and a reasonable exercise of a legitimate function of the Exchange?

Is the prejudicial effect, if any, upon interstate commerce so direct and substantial as to come within the Sherman Act, or so indirect or incidental as to be "too small to be taken into account"?

The legal test being thus established—in determining, whether this contract is within the statute, all the facts and circumstances existing at the time of its enactment, as well as its effect, are to be taken into consideration.

> *Anderson* v. *U. S.*, 171 U. S., 604 (1898);
> *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S., 227, at 266 (1909);
> *U. S.* v. *St. Louis Terminal*, 224 U. S., 383, at 395 (1912).

In the *St. Louis Terminal* case, the Court held that it would not be determined, whether the combination violated the Sherman Act "without a consideration of natural conditions greatly affecting the railroad situation at St. Louis." (p. 395).

While, doubtless, a contract or act may be *per se* a violation of the statute—that is, so necessarily and directly a violation as to render the intention unimportant—still, in all cases presenting the question, whether

the act is anything more than a normal and usual method to further trade, the intention or purpose of the parties necessarily becomes a fact to be considered.

U. S. v. *Union Pacific R. R. Co.*, 226 U. S., 61 (1912);
U. S. v. *Reading Co.*, 226 U. S., 324, at 370 (1912);
U. S. v. *St. Louis Terminal*, 224 U. S., 383, at 395 (1912);
Swift v. *U. S.*, 196 U. S., 375, at 396 (1905).

In the *Union Pacific* case, *supra*, the Court said, at page 93:

> "In determining the validity of this combination we have a right to look also to the intent and purpose of those who conducted the transactions from which it arose and to the objects had in view."

The 16th and 17th paragraphs of the verified answer of the New York Cotton Exchange—which are not contradicted by any counter-affidavits, by the reply or by the affirmative allegations of the amended bill—as well as the contract itself (R., pp. 19-21, 23-36), show the intention and purpose of the parties in making the contract to have been a proper and legitimate one and remote from any design or purpose to restrain or monopolize interstate or other commerce. Prior to 1903, the Telegraph Companies were permitted, without any restriction, to gather these quotations in the Exchange Room, and to sell them to anyone desiring to purchase. Naturally, the only motive of the Telegraph Companies was profit, and the more customers, the more the profit. But this resulted in the creation of many bucket shops throughout the country, places where the quotations of a legitimate exchange are posted on a blackboard and the keeper of the bucket

shop accepts all offers of persons resorting to his place to bet on the fluctuations of prices as indicated by such quotations, these alleged trades or bets being opened at the last price on the blackboard and being closed when the blackboard price reaches a point where the customer's margins are exhausted, or where prior thereto the customer desires to close his trade at the last named price on the blackboard, the quotations being thus essential to the conduct of such business. The use by those institutions throughout the country of the quotations of this and other legitimate exchanges necessarily brought the New York Cotton Exchange and other regular exchanges into discredit in the minds of many people who ignorantly supposed, from the presence of these quotations, that these bucket shops were in some way connected with these exchanges. To suppress these gambling places, so far as they were operating on its quotations, the New York Cotton Exchange made a contract in 1903, requiring the Telegraph Companies—in order to acquire the quotations—to enter into a contract with this Exchange substantially in the form of the present contract. The obvious purpose of this contract was to confine the distribution of the quotations to those desiring them for lawful purposes, and to thereby exclude their being given to persons who would not carefully safeguard them and confine them to their own offices. To the success of this purpose, it was essential that the quotations should be kept, not only from the bucket shops themselves, but from all persons who should acquire them for the purpose of surreptitiously re-transmitting them to bucket shops. To this end, the contract provided for a written application to be signed by each person desiring the quotations, in which he should agree with the Exchange and the Telegraph Companies, not only that the applicant would not himself use the quotations in conducting a bucket shop, but that

he would confine the quotations to his own office and not permit them to be communicated therefrom (R., pp. 20-21, 27-28).

This plan to prevent the misuse of quotations necessarily imposed, either upon the Exchange or the distributing Telegraph Company, the burden of determining the character and purpose of each applicant for the quotations. The mere willingness of an applicant to sign the prescribed application in itself furnished no guaranty. The machinery adopted by the contract was the only feasible one. The Telegraph Company had no pecuniary interest in restricting the number of its customers for quotations. The only person having a real interest in preventing the misuse of the quotations was the Exchange itself, and the contract conferred upon the Exchange the right and duty to pass upon the character and purpose of each applicant and made its decision final by providing that the Telegraph Company should not furnish the quotations to anyone whose application had been disapproved by the Exchange (R., pp. 20-21, 27-28). But that this provision of the contract making the decision of the Exchange final upon each application had no other purpose or intent than to safeguard the quotations is shown by that provision of the contract which contemplates the distribution of quotations to others than those who "may be directly or indirectly engaged in the promotion or maintenance of bucket shops or other places where such continuous quotations are used as a basis for bets or other illegal contracts based upon fluctuations of the prices of cotton" (R., p. 26).

This contract does not undertake to fix the prices which the Telegraph Company must exact from those desiring the continuous or other quotations. It does fix the maximum price to be charged members of the Exchange, but does not prescribe minimum prices to anybody (R., p. 26). The contract is, therefore, not to be

condemned as within the principle established by the Supreme Court in

Bobbs-Merrill Co. v. *Straus,* 210 U. S., 339 (1908);
Dr. Miles Medical Co. v. *Park & Sons Co.,* 220 U. S., 373 (1911);
Bauer & Cie. v. *O'Donnell,* 229 U. S., 1 (1913);
Straus v. *Am. Publishers Ass'n,* 231 U. S., 222 (1913);
Straus v. *Victor Talking Machine Co.,* 243 U. S., 490 (1917);
Boston Store of Chicago v. *Am. Graphophone Co.,* 246 U. S., 8 (1918);
U. S. v. *A. Schrader's Son, Inc.,* 252 U. S., 85 (1920),

which prohibit agreements made by patentees or others with their purchasers under which the latter agreed to resell at the prices fixed by the former. These cases are reviewed in *Boston Store* v. *Am. Graphophone Co., supra.* The contracts condemned are those which aim to establish a price maintenance system and a permanent marketing price.

The contract in the case at bar has no such purpose. Applying to it "the rule of reason", neither the nature, nor the character of the contract, nor the circumstances surrounding it, justify the conclusion that it is entered into for the purpose of restraining trade or of creating a monopoly, or for any purpose other than that of properly and fairly regulating the transaction of the business for which the New York Cotton Exchange was organized and of preventing the misuse of its quotations. It is but a normal method of accomplishing a highly beneficial purpose—the prevention of the use of quotations in bucket shops. As such the contract is not within Section 1 of the Sherman Act as construed by the decisions of the Supreme Court already cited.

Nor can the contract be construed as an attempt to monopolize interstate commerce within the second section of the Sherman Anti-Trust Act.

The quotations of the New York Cotton Exchange, when collected and distributed under the restrictions prescribed by this contract, are property and belong exclusively to that Exchange.

> *Chicago Board of Trade* v. *Christie*, 198 U. S., 236 (1905);
> *Hunt* v. *New York Cotton Exchange*, 205 U. S., 322 (1907).

The contract provides (1) that the Exchange shall collect the quotations and give them to the Telegraph Company; (2) that the Telegraph Company shall take from each applicant an application in which he stipulates with that Company and the Exchange respecting the use of the quotations; (3) that such quotations are to be transmitted to the applicant only after the Exchange has had time to investigate, and has approved the application; and (4) that the Exchange may terminate the right of any person who receives the quotations, and that thereupon the Telegraph Company will cease to furnish the quotations to such person (R., pp. 24, 27-29, 30).

In other words, the Exchange determines to whom the quotations shall be given. It may at any time determine that they should be withdrawn from any person receiving them, and the Telegraph Company agrees to do this whenever requested by the Exchange. All of these provisions emphasize the purpose of the parties to be that the Exchange should retain control of the quotations and the right to withdraw them from anybody misusing them. In legal effect, this is a contract by which the Telegraph Company, as the carrier, agrees to transmit this news for the Exchange to certain persons to be designated by

it, and to accept from the Exchange as compensation for such service all that can be realized from the quotations in excess of $27,500 per year, the Telegraph Company guaranteeing that such distribution shall net the Exchange that sum (R., p. 32). In other words, under this contract, the Exchange is the real distributor of the quotations, and the Telegraph Company is an agency employed by the Exchange to facilitate such distributions. A similar contract was thus construed in

Matter of Renville, 46 App. Div., 37 (1899),

where Justice INGRAHAM said at page 43:

> "Under this agreement between the stock exchange and the respondents, certain information is given to the telegraph company to be communicated to individuals or corporations designated by the stock exchange. * * * The fact that the telegraph company pays to the stock exchange a certain sum of money for the information which it receives to transmit is also immaterial. The substance is that those to whom this information is directed to be given by the stock exchange are willing to pay the stock exchange for such information, and are also willing to pay the telegraph company the expense of transmitting the information. The information delivered to the respondents for transmission is a communication which the stock exchange wishes to transmit to the persons it designates and to no one else. I can see no reason why the stock exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the respondents should be required to violate their agreement with the stock exchange and the law of this State, and furnish to the appellant information which had been communicated to the respondents by the stock exchange for a specific purpose and none other."

See also

Wilson v. *Commercial Telegram Co.*, 3 N. Y. Supp., 633 (1888);

Bryant v. *Western Union Tel. Co.*, 17 Fed. Rep., 825 (1883).

As the owner of the quotations, the Exchange is under no legal duty to sell it to any particular person nor is it under any legal obligation to sell to all because it sells to some. It has the legal right to determine to whom it will sell, and to require its agent (the Telegraph Company) which it employs to effect sales to carry out its purpose to select its purchasers, and, in exercising this right to select those to whom it will communicate the quotations, it does not attempt to monopolize or otherwise violate the Sherman Act or the general law. This is well shown in

Whitwell v. *Continental Tobacco Co.*, 125 Fed. Rep., 454 (1903),

where a corporation manufacturing tobacco, through its selling agent, refused to sell to those who desired to purchase, on terms that would be profitable to them, unless they refrained from dealing in the goods of the company's competitors, and this was claimed to violate the Sherman Act. But the Circuit Court of Appeals (8th Cir.) held otherwise, saying at page 461:

> "The tobacco company and its employe were not required, like competitors engaged in public or *quasi*-public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons."

As was said in

United States v. *Trans-Missouri Freight Association*, 166 U. S., 290, 320 (1897),

"The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; * * *."

And as was said in,

Eastern States Lumber Association v. *United States*, 234 U. S., 600, 614 (1914),

"A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade."

And as was said in,

United States v. *Colgate & Co.*, 250 U. S., 300, 307 (1919),

"In the absence of any purpose to create or maintain a monopoly, the [Sherman] Act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."

In *United States* v. *A. Schrader's Son, Inc.*, 252 U. S., 85 (1920), the Court re-affirmed *United States* v. *Colgate*, and again distinguished that case from its other decisions dealing with agreements attempting to fix permanent marketing prices. Supporting the same principle is the case of

Bitterman v. *Louisville & Nashville R. R. Company*, 207 U. S., 205, 222 (1907),

sustaining an injunction against the resale of non-transferable railroad tickets, and the recent decision of the Supreme Court in *Federal Trade Commission* v. *Curtis Publication Co.*, 260 U. S., 568 (1923), upholding a contract by a Philadelphia newspaper with its distributors which prevented them from distributing other newspapers.

But the question whether this contract is to be condemned as a restraint upon trade or an attempt at monopoly, either under the Sherman Act or the general law, is conclusively settled in the negative by the decision of this Court in *Board of Trade* v. *Christie Co.*, 198 U. S. 236 (1905). The contract in this record is substantially the same as the contract under consideration in that case, which was made by the Chicago Board of Trade with the Telegraph Companies for the distribution of its quotations. In a suit brought by the Board of Trade in the Federal Court of Kansas City, to prevent the purloining of those quotations, the defendants contended that the contract violated the Sherman Act, but the District Court held that it did not. (*Board of Trade* v. *Christie Co.*, 121 Fed., 608 (1903).) Upon an appeal of the case to this Court, the same contention was made and rejected in an opinion written by Justice Holmes who said, at page 252:

> "Finally it is urged that the contracts with the telegraph companies violate the act of July 2, 1890, c. 647, 26 Stat. 209. * * * But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to any one, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law. *Bement* v. *National Harrow Co.*, 186 U. S., 70; *Fowle* v. *Park*, 131 U. S., 88; *Elliman* v. *Carrington* (1901) 2 Ch. 275. It is argued that the true purpose is to exclude all persons who do not deal through members of the Board of Trade. Whether there is any-

> thing in the law to hinder these regulations being made with that intent we shall not consider, as we do not regard such a general scheme as shown by the contracts or proved."

This decision was subsequently approved in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S., 373 (1911), where the Court condemned agreements aimed to establish permanent marketing prices, and distinguished the *Christie* case from the principle of the price-fixing cases.

The contract here thus being neither an attempt at monopoly nor a contract in restraint of trade, it remains to consider whether on any other principle of law, the plaintiff is entitled to the quotations belonging to the appellee. If so, it must be either:

(1) Because the quotations have become legally impressed with a "public use" to the extent that, if distributed at all, they must be distributed without discrimination, except to bucket shops; or

(2) Because the Exchange, by resorting to the telegraph companies—as, because of the nature of the property, it must do in order to sell at all—involuntarily impairs its property right to the extent of being obliged to sell it to those to whom it does not think it safe to entrust its quotations. In other words, the Exchange must suffer this impairment of its property in order to secure the services of common carriers to realize its value.

Upon this first question the Illinois Supreme Court has held in

> *New York, etc., Exchange* v. *Board of Trade*, 127 Ill., 153 (1889),

that, while the Chicago Board of Trade was under no legal obligation to furnish its quotations to the public, they had, because distributed unrestrictedly for a number of years, become so affected with a public use and so

subject to regulations by the courts, that, if distributed at all, they must be sold without discrimination to all who may desire them for lawful purposes, basing its decision upon *Munn* v. *People*, 94 U. S., 113 (1877). It was not, however, even suggested in that decision that the Board of Trade's right in its quotations was in any way impaired because public telegraph companies assisted in their distribution. But the Illinois Court here failed to notice that *Munn* v. *People*, involved only the validity of a *statute* fixing rates of storage in public elevators, which the Court upheld because a proper exercise of the police power.

On the contrary the following cases uphold the right of an Exchange—at least in the absence of affirmative legislation—to say to whom its quotations shall go, especially where, as in the case at bar, they are collected by the Exchange itself.

Board of Trade v. *Christie*, 116 Fed. Rep., 944 (1902);
Matter of Renville, 46 App. Div., 37 (1899);
Metropolitan Grain & Stock Exchange v. *Chicago Board of Trade*, 15 Fed. Rep., 847 (1883);
Bryant v. *Western Union Telegraph Co.*, 17 Fed. Rep., 825 (1883);
Marine Grain & Stock Exchange v. *Western Union Tel. Co.*, 22 Fed. Rep., 23 (1884);
Wilson v. *Commercial Tel. Co.*, 3 N. Y. Supp., 633 (1888).

In *Board of Trade* v. *Christie, supra*, Judge Hook said at page 946:

> "* * * * I am of the opinion that courts cannot by their decrees assume the initiative in declaring private property to be impressed with a public use. * * * The power to bring under government

> control the lawful business of individuals and private corporations not vested with the power of eminent domain, and who are not engaged in what, by common acceptation, is termed a public service, for the reason that such business, through the enterprise and prudent management of its conductors, has grown to be of great public interest and concern, is of the gravest and most momentous character. * * * When such a condition arises, the measure of the public control is limited by the extent of the public interest, and the making of regulations pertaining thereto is of the legislative, not judicial, cognizance."

In *Matter of Renville, supra,* the Appellate Division, First Department, said at page 43:

> "No statute requires a telegraph company to communicate to the public despatches which it has received from certain individuals to be transmitted to specified persons; * * *. I can see no reason why the stock exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the respondents [telegraph companies] should be required to violate their agreement with the stock exchange and the law of this State, and furnish to the appellant information which had been communicated to the respondents by the stock exchange for a specific purpose and none other * * *.
>
> * * * But the question may well be asked, Where does the court get this power? No statute gives it. * * * and to grant such an application would, it seems to me, be an interference with the liberty of the individual which is protected by the constitution and the law."

That private property may be impressed with a public use only by legislative act has also been decided.

Express Cases, 117 U. S. 1 (1886);

A. T. & S. F. R. Co. v. *D. & N. O. R. Co.*, 110 U. S., 667, 682 (1884);
State v. *Associated Press*, 159 Mo. 410 (1901);
Ladd v. *S. C. P. & M. Co.*, 53 Tex., 172 (1880);
Del. L. & W. R. R. v. *Central Stock Yards Co.*, 45 N. J. Eq., 50 (1889);
Heim v. *N. Y. Stock Exchange*, 118 N. Y. Supp., 591 (1909).

In *Express Cases, supra,* where one express company claimed from a railroad company the same privileges it conferred on another express company, the Court said at page 29:

> "The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt."

The Illinois Court, while apparently overlooking this principle in *New York, etc., Exchange* v. *Board of Trade*, 127 Ill., 153, *supra,* subsequently recognized it in

> *American Live Stock Commission Company* v. *Chicago Live Stock Exchange*, 143 Ill., 210 (1892),

where it rejected the contention that the Chicago Live Stock Exchange had, by reason of its magnitude and far-reaching influence upon the country, become impressed with a public use, saying (p. 238):

> "Ordinarily the adoption of new rules of public policy, or the application of existing rules to new subjects, is for the Legislature and not for the courts. Accordingly it may be held to be a

> general, though perhaps not an invariable rule, that the question whether a particular business which has hitherto been deemed to be private, is public and impressed with a public use, is for the Legislature. * * *
>
> Apart from the consideration that the extension and application of even existing rules of law to subjects not heretofore within their purview is legislative in its nature, the determination by the courts as to the precise point at which a mere private business reaches that stage of growth and expansion which is sufficient to render it *juris publici*, would be surrounded with very great difficulties, and would present questions for which the courts, unaided by legislation, would be able to find no just or satisfactory criterion or test."

There have been no statutes, state or federal, making these quotations open to all, and this for obvious reasons.

It is highly promotive of public welfare that the New York Cotton Exchange should assume the duty of safeguarding its quotations so as to suppress bucket shops. The only persons, other than bucket shops, requiring these continuous quotations are those who are engaged in the business of buying and selling cotton covered by them, and bankers who loan on such collateral. Among such persons it is the self interest of every exchange to give its quotations the widest possible distribution, as this increases the business of its members, which is one of the aims of every exchange.

What must be guarded against is the receipt of the quotations not only by bucket shops, but also by those who conduct a small broker's office or exchange, as a cloak, in order to get quotations to secretly transmit to bucket shops throughout the country. To establish by legal proof that such persons wish the quotations for that improper purpose is often very difficult. The Telegraph Company has not sufficient interest to assume this burden, and the few successful prosecutions of

bucket shops under the criminal laws prove that the government officials could not be expected to carry on the thorough investigations and prosecutions necessary to prevent the use of these quotations in bucket shops. Thus the States and Congress have wisely left to the exchanges the task of properly restricting the use of their quotations and have deemed the high character of these exchanges a sufficient guarantee against abuse or injustice in the dissemination of their quotations.

Do these quotations, not being impressed with a public use while in the possession of the Exchange, become thus open to all when given to the telegraph companies?

If the Exchange is the distributor of the quotations through the agency of the Telegraph Company, a negative answer would seem to be unavoidable; for any other rule would make the news of associations like the Associated Press, and even private messages, open to all, which is at variance with the decisions.

> *Matthews* v. *Associated Press*, 136 N. Y., 333 (1893);
> *State* v. *Associated Press*, 159 Mo., 410 (1901).

It is argued that by its contract with the exchange the Telegraph Company acquired by purchase an *unlimited* ownership in the quotations, and that being thus possessed in its public capacity the rule that common carriers must serve all alike applies to the distribution of quotations.

This position is erroneous because the Telegraph Company under this contract acquires, if any interest, only a restricted one—a right to sell to certain designated persons; and when it has done this its entire interest in the quotations is gone.

See

> *Bitterman* v. *L. & N. R. R.*, 207 U. S., 205 (1907), at 222.

Furthermore, if the Telegraph Company be adjudged the seller of these quotations, it is not, in delivering them to these designated persons, acting in its public capacity as a common carrier, but merely as a dealer in news, and it should not be required to give to others what it has not itself legally acquired. The Telegraph Company can only buy this news on the terms imposed by the Exchange, and the latter's right to impose such terms is expressly recognized in cases already cited.

Again the Telegraph Company, if the seller, is, as respects these quotations, within the principle that there are certain things a carrier may do, which are not subject to the rule—applicable to its service strictly as a common carrier—that all persons must be treated by it alike. Such things do not form a part of its public service, but are in the nature of accessories.

Thus a railroad company is not obliged to grant a person a right to construct an elevator upon its right of way, although it had already given others that privilege.

> *Missouri Pacific R. R.* v. *Nebraska*, 164 U. S., 403 (1896).

Nor is a railroad company obliged to allow all express companies to conduct an express business upon its road because it permits one to do so.

> *Express Cases*, 117 U. S., 1 (1886).

A railroad company may also allow one person to use its depot as a cab-stand, or to travel on its trains for the purpose of soliciting from incoming passengers the transportation of themselves or their baggage, without being under the obligation to grant the same privilege to others.

> *Donovan* v. *Penn. Company*, 199 U. S., 279 (1906);
> *Old Colony R. R.* v. *Tripp*, 147 Mass., 35 (1888);
> *Sargent* v. *Boston & Lowell R. R.*, 115 Mass., 416 (1874).

The Pullman Company, though a common carrier in its sleeping car service, is not such as respects its business of manufacturing cars. A state has no right to fix the price at which it should sell its cars. A railroad company when authorized to mine coal for sale is not a common carrier as respects its coal business.

So, a telegraph company, although a common carrier, as respects the transmission of messages for hire, is not such in its purchase and sale of news.

> *Bradley* v. *W. U. Telegraph Co.*, 8 Ohio Dec. Reprint, 707 (1883);
> *Sterrett* v. *Telegraph Co.*, 18 Weekly Notes of Cas. (Penn.), 77 (1886).

The *Bradley* case involved the distribution of the quotations of the Chicago Board of Trade, and arose before the making of the contract involved in *New York, etc., Exchange* v. *Board of Trade*, 127 Ill., 153, and while the telegraph company, through its employees, was collecting this news on the floor of the exchange; and the Court (Judge MAXWELL), in denying an injunction against the telegraph company, the only defendant, said:

> "This business of collecting and furnishing 'commercial news' is entirely separate and distinct from the business of the defendant as a common carrier of messages for hire from one person to another, over its wires, and I cannot see that it differs in its nature from the business of any of our merchants who purchase goods and merchandise, in the east and elsewhere, and bring them here to dispose of to their customers. * * * The law of bailment is the foundation of the law governing common carriers, and the ordinary definition of bailment is, a delivery of something of a personal nature by one to another upon a contract, express or implied, that that other will dispose of the thing according to the instructions given him. * * * But in this case, the quotations collected by the defend-

ant are its own property until delivered into the possession of the plaintiff and are not in any sense the subject of a bailment. I am not aware of any adjudicated cases on the subject, but it seems to me clear on principle, that in collecting and furnishing the quotations which are the subject of this controversy, the defendant was engaging in a business entirely distinct from its public duties." (p. 708).

See also

Chesapeake and Potomac Tel. Co. v. *Manning*, 186 U. S., 238, 247 (1902).

It follows, therefore, that there is no legal theory upon which plaintiff is entitled to an injunction.

POINT II.

The transactions on which the amended bill is based do not involve interstate commerce.

Appellant seeks a mandatory injunction directing appellees to supply to it the continuous quotations of prices of cotton sold on contracts for future delivery made on the New York Cotton Exchange.

A. Such contracts are made in the board room of the Exchange and provide that the cotton is "deliverable from licensed warehouses in the port of New York." Performance of the contract in the month when the cotton is deliverable must be made by the delivery of negotiable warehouse receipts issued by licensed warehouses in the port of New York (R., p. 16). There is no obligation to make delivery at any place except in that

port. The fact that at some time before delivery the cotton must be brought from one of the cotton growing states does not affect the obligation imposed by the contract, which may be, and probably almost always is, performed by the seller obtaining for delivery warehouse receipts representing cotton already stored in a licensed warehouse within the port of New York. The fact that cotton may be in a warehouse in New Jersey does not alter this situation for the locality of the performance is to be judged by the obligation it imposes; and that obligation may be discharged by a warehouse receipt representing cotton in the City of New York.

Clearly this transaction is local in its character and does not involve interstate commerce.

In *Hopkins* v. *United States*, 171 U. S., 578 (1898), members of the Kansas City Livestock Exchange received consignments of cattle from owners in other states upon an arrangement that they should be sold and the net amount realized on the sale returned to the owners. Money was advanced on the cattle to induce owners to ship them to the Kansas City market. The Court held that the transaction did not involve interstate commerce, saying at page 588:

> "Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the Kansas City stock yards, is not the substantial factor in the case. The character of the business of defendants must, in this case, be determined by the facts occurring at that city."

And at page 590:

> "The selling of an article at its destination, which has been sent from another State, while, it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place

> where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce."

The Court used for illustration the case of a transaction on the New Orleans Cotton Exchange similar to transactions on the New York Cotton Exchange, and said at page 598:

> "Is a New Orleans cotton broker who is a member of the Cotton Exchange of that city, and who receives consignments of cotton from different States and sells them on 'change in New Orleans and accounts to his consignors for the proceeds of such sales less his commission, engaged in interstate commerce? * * * We think it would be an entirely novel view of the situation if all the members of these different exchanges throughout the country were to be regarded as engaged in interstate commerce, because they sell things for their principals which come from States different from the one in which the exchange is situated and the sale made."

There was a similar decision in *Anderson* v. *United States,* 171 U. S., 604 (1898), where it appeared that the defendants, instead of acting on commission, were themselves the actual purchasers of the cattle, but the Court held that the effect of the transactions on interstate Commerce was only indirect. While the refusal of the defendants to do business with commission men, selling to or purchasing from yard traders who were not members of the Exchange, might have an effect upon interstate commerce, the effect was "quite remote, not intended and too small to be taken into account" especially as the Exchange itself did not "meddle with prices" or do any business.

In *Ware and Leland* v. *Mobile County*, 209 U. S., 405 (1908), it was held that a state tax upon persons engaged in buying and selling cotton for future delivery was not a regulation of interstate commerce because such sales did not involve such commerce. Judge DAY said that, even though orders were transmitted from other states, the property was bought within the state and there held for the purchaser. He added, at page 413:

> "The transaction was thus closed by a contract completed and executed in the foreign State, although the orders were received from another State. When the delivery was upon a contract of sale made by the broker, the seller was at liberty to acquire the cotton in the market where the delivery was required or elsewhere. He did not contract to ship it from one State to the place of delivery in another State. And though it is stipulated that shipments were made from Alabama to the foreign State in some instances, that was not because of any contractual obligation so to do."

To the same effect is *Hill* v. *Wallace*, 259 U. S., 44 (1922),

The principle of the foregoing cases establishes not only that the contracts made on the New York Cotton Exchange do not involve interstate commerce, but also that the transactions upon the board of the appellant, as described in the amended bill of complaint, do not involve interstate commerce, for they are alleged to be essentially of the same character as those of the New York Cotton Exchange (R., pp. 2, 14).

B. The question remains whether the transmission of continuous quotations representing sales on the New York Cotton Exchange themselves so affect interstate transactions as to be a subject for regulation by the Federal Government. If sales made in one state are not of an interstate character even when they are expressly

based upon contemplated shipments from other states, as in the *Hopkins* and *Anderson* cases, and inducements are extended to owners to make such shipments, mere information concerning the prices at which such sales are made, communicated wholly within this State, cannot reasonably be said to affect directly interstate commerce. Continuous quotations giving information as to prices are like the services of commission merchants in the *Hopkins* case, merely "an aid or facility to commerce and which if it affect interstate commerce at all, does so only in an indirect and incidental manner." In that case it was held that correspondence relating to the sale was merely a local "aid or facility", collateral to the commerce itself. And even such incidents of sales as the loaning of money to encourage them and combinations among the brokers as to the amount of selling charges, were likewise held to be mere incidents not having a direct effect to limit competition in trade between States.

A feature of the transaction dealt with by the Court in the *Hopkins* case has a striking similarity to the facts in the case at bar. There was an agreement among the defendants to abstain from telegraphing in regard to their business in certain contingencies, and the Court said that this was not

> "a direct attempt to affect the business of the telegraph company, and has no direct effect thereon. Although communication by telegraph may be commerce, and if carried on between different States may be commerce among the several States, yet an agreement or by-law of the nature of the one under consideration is not a burden or a regulation of or a duty laid upon the telegraph company, and was clearly not entered into for the purpose of affecting in the slightest degree the company itself or its transaction of interstate commerce" (171 U. S., at p. 599).

In *Hill* v. *Wallace*, the doctrine was affirmed that sales for future delivery were not "in and of themselves interstate commerce", yet Congress had power to regulate them if it should conclude that because there were "exorbitant charges, dishonest practices and collusion", the failure to regulate was likely "to impose a direct burden on interstate commerce." But we have no such case here.

The object of protecting continuous quotations is (1) to prevent their wrongful use for bucket shops, and (2) to protect the Exchange by preventing the theft of its property rights (R., pp. 18, 20). Such purposes as these, either from the moral or the legal standpoint, are entirely proper, and there is no element of exorbitant charge or dishonesty or collusion or illegality making them a suitable subject for regulation because of their effect on interstate commerce. That applicants for ticker service must receive the approval of the New York Cotton Exchange gives an advantage to that Exchange and to those whose applications it approves, but that is an incident of ownership similar to the right that any man has to select the person to whom to sell his property. In *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S., 236 (1905), it was claimed that the contracts between the telegraph companies and the Chicago Board of Trade, similar to the contract in the case at bar, were in violation of the Anti-Trust Law, but Justice Holmes, in delivering the opinion of the Court, said at page 252:

> "But so far as these contracts limit the communication of what the plaintiff might have refrained from communicating to anyone, there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law."

Clearly, the failure of the New York Cotton Exchange and the Telegraph Company to give to the appellant con-

tinuous quotations, does not directly affect interstate commerce, and has not, therefore, been regulated by the Anti-Trust Laws.

POINT III.

The Circuit Court of Appeals had jurisdiction to entertain appellees' counterclaim and to grant a final injunction thereon.

The appellant, by its Tenth, Eleventh and Twelfth Assignments of Error, has raised the following objection to the jurisdiction of the court to entertain the counterclaim:

1. That the court having dismissed the amended bill of complaint because the acts complained of were not a violation of the Anti-Trust Law, should have dismissed the counterclaim since there was no diversity of citizenship between the parties.

2. That the court erred in holding that the amended bill of complaint and the counterclaim related to the same subject matter and that there need not be jurisdiction of the counterclaim independently of the amended bill.

3. That the court having determined that the facts set forth in the amended bill of complaint failed to show federal jurisdiction thereupon lost further jurisdiction over the subject matter and in ordering the dismissal of the amended bill of complaint should have dismissed the counterclaim (R., p. 73).

Appellant argued before the Circuit Court of Appeals that the order, granting a preliminary injunction to appellees enjoining appellant from receiving or using the continuous quotations of the New York Cotton Exchange, should be reversed because the Court did not have juris-

diction to entertain the counterclaim: (1) because there was no diversity of citizenship between the parties; (2) because the counterclaim does not arise out of the same transaction which is the subject matter of the amended bill.

In granting the preliminary injunction Judge Hand disposed of this argument by holding that the Court had jurisdiction to entertain the counterclaim because it was ancillary to the main controversy presented by the bill and "necessary to a complete disposition of the subject matter of the bill and to the protection of the rights involved" and because "a decree under the counterclaim would do no more than secure to the defendant the complete enjoyment of a decree on the bill" in appellees' favor (R., pp. 50-51).

The Circuit Court of Appeals affirmed the order made by Judge Hand denying appellant's motion for a preliminary injunction and granting to appellees a preliminary injunction on their counterclaims enjoining appellant from receiving or using the continuous quotations of the appellee New York Cotton Exchange, and it dismissed the amended bill of complaint on the ground that the contract between the New York Cotton Exchange and the Telegraph Companies was not entered into for the purpose of restraining trade or creating a monopoly. The Court said:

> "It cannot be said that the contract involved was entered into for the purpose of restraining trade or creating a monopoly. It appears to us that its purpose was that of properly regulating the transaction of the New York Cotton Exchange and of preventing the misuse of its quotations. It is not a contract in restraint of trade or commerce within the meaning of Section 1 of the Sherman Act as construed by the Supreme Court. Neither is it an attempt to monopolize trade or commerce among the several States within the meaning of Section 2 of the Sherman Act" (R., p. 64).

The Court also held that the New York Cotton Exchange was not engaged in interstate commerce, saying:

> "The contracts made on the New York Cotton Exchange are made in the Board Room of the Exchange in the City of New York and they provide that the cotton is deliverable from licensed warehouses in the Port of New York. Performance of the contract is made by the delivery of negotiable warehouse receipts issued by licensed warehouses in New York. There is no obligation to make delivery at any place except in the Port of New York. Such a transaction is local in its character and does not involve interstate commerce. The decisions of the Supreme Court make this clear" (R., p. 65).

Having thus after a careful analysis of the contract governing the distribution of the quotations and the acts performed by the New York Cotton Exchange come to the conclusion that there was no restraint of trade or monopoly the Court dismissed the amended bill of complaint but granted relief on the counterclaim, saying:

> "While the court was without jurisdiction to grant the relief which the complainant sought because the facts stated in its bill did not constitute a restraint of interstate commerce as alleged it necessarily had jurisdiction to determine the question at issue between the parties. As it acquired jurisdiction for that purpose it acquired jurisdiction of the counterclaim as its subject matter was related to and connected with the matters in the original bill, those matters being the future quotations of the Exchange and the contract restricting their distribution" (R., pp. 67-68).

After the Court had rendered this decision and in order that there might be a complete disposition of the case by a decree final as to the relief on the counterclaims as well as to the dismissal of the amended bill the parties

stipulated that the affidavits used by appellees in support of their motion for a preliminary injunction should "have the force and effect of testimony in support of the counterclaims" offered at the trial and that the Circuit Court of Appeals might direct such final judgment on the counterclaims as in its opinion should be entered. That Court pursuant to this stipulation then entered its decree awarding a final injunction to defendants (R., p. 70).

The subject matter of the amended bill and the counterclaim is the same.

Both the amended bill and the counterclaim relate to the same subject matter—the use in the future of the continuous quotations of the New York Cotton Exchange. The bill seeks a mandatory injunction to obtain them, alleging that the refusal of the appellees to furnish them is wrongful because in pursuance of a contract to suppress competition and a step in a scheme to monopolize the business of dealing in cotton. The appellant claims that the contract between the appellees, in so far as it interferes with his demand for the quotations, is illegal under the Anti-Trust Laws of the United States and on this ground invokes the aid of a Federal Court. The appellees admit the refusal to furnish the quotations, but deny that it is a part of a scheme to monopolize or suppress competition and assert the validity of the contract and the right of the New York Cotton Exchange to withhold its quotations from appellant. The appellees have been successful, the Court has held that the contract is valid and that appellees have the right to withhold the quotations from appellant and that appellant has no right to demand them. The counterclaim asks that this right of appellees to withhold the quotations be protected from appellant by forbidding him to purloin them.

We submit that the injunctive relief demanded by appellees in the counterclaim is ancillary to a complete

disposition of the controversy thus presented by the bill.

The appellees plead that they have the right to refuse the quotations and ask that their enjoyment of this right be protected by injunction against unlawful interference by appellant. Appellees have established this right and the decree forbids its impairment by appellant, as prayed in the counterclaim. Thus they only secure the complete enjoyment of their rights established by the decree. This result is clearly ancillary to a complete disposition of the original controversy.

One of the earliest principles of equity jurisprudence is

> "that where a court of equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues, and to award complete relief" (Pomeroy Equity Jurisprudence, 3rd Ed., Sec. 231).

See also

> *Pierce* v. *New York Dock Co.*, 265 Fed. Rep. 148, 158 (1920);
> *McGowan* v. *Parish*, 237 U. S. 285, 296 (1915).

It, of course, became necessary that equity pleadings and practice should aid in the application of this maxim. Here, doubtless, will be found the origin of the cross-bill of equity practice.

It could not be expected that the complainant's bill would assert more than his claim or side of the case. The answer was logically confined to matter of a defensive character. Sometimes, at least, an answer, properly limited, would not disclose all the facts on which the defendant claimed to be entitled to relief against the complainant or upon which the court could award complete relief; nor was a prayer for relief against the complainant a proper part of the answer. Thus arose the neces-

sity for a cross-bill. Some limitation had to be placed upon the right of the defendant to inject into the plaintiff's suit a controversy in which defendant sought relief. Otherwise there might be brought into complainant's suit by a cross-bill claims, wholly unrelated to the matter involved in complainant's bill, resulting in an undue enlargement and prolongation of litigation and constant confusion of the issues. It was, therefore, found necessary to limit the scope of the cross-bill to claims relating to the subject matter involved in the original bill. This then became the doctrine of English equity practice which at first limited the defendant in his cross-bill to the assertion of claims "touching the matters in question in the original bill" (Mitford's Equity Pleading, by Jeremy, 80, 81). But the purpose of the cross-bill was "to procure a complete determination of a matter already in litigation" (2 Daniell's Chan. Pr., *1549).

Atlanta Mills v. *Mason*, 120 Mass., 244 (1876), presents an illustration of the proper use of a cross-bill strikingly analogous to the counterclaim in the case at bar. The complainant, a mill owner, sought to prevent the maintenance of a dam at an excessive height by an owner of property lower down the stream. Defendant filed a cross-bill to restrain a diversion of the water by complainant, and it was held that this was a proper subject of a cross-bill because defendant's grievances "relate to the subject matter presented by plaintiff's bill, namely, the rights of the respective parties in the use of a stream which furnishes the power for each privilege * * *" (p. 250).

Even in the absence of other grounds of Federal jurisdiction a suit can be maintained in a Federal court if it is ancillary to another suit of which that court has jurisdiction and is brought to protect rights adjudicated by the Court in reference to the subject matter of the

original suit and to render effectual rights adjudicated therein.

Raphael v. *Trask*, 194 U. S., 272, 278 (1904); *Stillman* v. *Combe*, 197 U. S., 436 (1905).

Where the bill presents a Federal question sufficient to sustain jurisdiction, the Court has "the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only." *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S., 175, 191 (1909).

See also

Geddes v. *Anaconda Copper Mining Co.*, 254 U. S., 590 (1921).

The courts have also repeatedly held that cross-bills, now called counterclaims, may be maintained, even in the absence of independent Federal grounds of jurisdiction, if ancillary to the main controversy presented by the bill or necessary to a complete disposition of the subject matter of the bill and to the protection of the rights involved.

In *Kingsbury* v. *Buckner*, 134 U. S., 650, 676 (1890), a bill was filed to enforce a contract. Defendant interposed a cross-bill to annul the contract on the ground of fraud, or to reform it on the ground of mistake. The Court held that the matter in question in the original suit was the contract; that the cross-bill related to the same matter, and that, although it was true that the cross-bill alleged additional facts, "its subject matter was not the less, for that reason, germane to the original bill." In such a case, a fraud in the contract could be relied upon wholly as a defense, and the presence of the cross-bill does not enlarge the evidence. Its only utility is to enlarge the

decree so as to give the defendant more fully the benefit of it, if successful. It touches the matter in question in the original suit.

The bill in the case at bar is the converse of the foregoing. It seeks to annul the contract between the Telegraph companies and the Exchange, to impose upon the Telegraph companies the duty to serve all alike, and thus to obtain the quotations. The counterclaim asserts the validity of the contract, and seeks, if the Court sustains its validity, to secure the full benefit of that decision and of the contract against the plaintiff, whose conduct is nullifying it. Clearly the subject matter and "matters in question" in the original bill are the future quotations and the contract restricting their distribution; and the only purpose of the counterclaim is to obtain for the Cotton Exchange the full benefit of a decision upholding the contract. It seeks only to put the Court in a position to administer complete relief in this suit, instead of compelling the appellees to resort to another suit. The counterclaim does not bring in any new "subject matter." It relates to the same contract and to the same future quotations which the appellant seeks to obtain by having that contract declared illegal. The counterclaim does not enlarge the allegations of the answer, and hence, does not increase the proof required. The appellee, the Cotton Exchange, as part of its answer, alleges that the Odd-Lot Exchange is already purloining these quotations and it claims that because of this fact (1) The Odd-Lot Exchange did not come into court with clean hands; and (2) The Cotton Exchange was justified in refusing its application for the quotations, because the Odd-Lot Exchange was receiving them and distributing them, and that such use of them would impair their value and defeat the Cotton Exchange's efforts to prevent their getting into the hands of bucket shops. It, therefore, appears that the receipt and use of these quotations was

made by the answer an issue in appellant's case, both as a defense to justify the refusal to furnish appellant with the quotations and as a counterclaim to prevent his surreptitiously obtaining them; and for the latter purpose, no evidence is required additional to that which would have to be interposed to sustain the defense. The only matter in the counterclaim that is not already properly in the answer is the prayer for affirmative relief.

Surely under these circumstances, the court, after deciding all the issues in the case, is empowered to enter a decree enjoining the appellant.

In *Hogg* v. *Hoag*, 107 Fed. Rep., 807 (1901) (S. D. N. Y., aff'd 154 Fed. Rep. 1003), Judge WALLACE held that, in a suit to secure the appointment of a new trustee in the place of one who had died, a cross-bill by beneficiaries demanding an accounting was proper, although it could not have been sustained as an original bill for lack of jurisdiction because there was no diversity of citizenship between the parties. The Court decided that the cross-bill could be maintained "As auxiliary to and dependent upon the original suit, such a bill is a proceeding to procure the complete determination of the matter already in litigation" (p. 814).

In *Osborne & Co.* v. *Barge and Others*, 30 Fed. Rep., 805 (1887), Judge SHIRAS held that where a Circuit Court of the United States had jurisdiction of a suit to foreclose a chattel mortgage, it might entertain a cross-bill therein filed by an intervenor, claiming to be owner of a part of the property, although, because his citizenship was the same as that of the defendant, the intervenor could not have originated the suit, saying at page 806:

> "As already stated, the jurisdiction of the cause of action presented by the original bill, and of the parties thereto, cannot be and is not questioned. Having acquired full and complete jurisdiction of the original cause, and the parties thereto, the court cannot be deprived thereof because

> another party obtains leave to intervene for the assertion of a right to the property which is the subject of the proceeding. If it be necessary for the protection of the rights of a third party that he be heard in the cause pending, he may be permitted to intervene, even though the court would not have, by reason of his being a citizen of the same state with complainant, jurisdiction over an original proceeding between the same parties. *Freeman* v. *Howe*, 24 How., 450; *Krippendorf* v. *Hyde*, 110 U. S., 276, 4 Sup. Ct. Rep., 27; *Phelps* v. *Oaks*, 117 U. S., 236, 6 Sup. Ct., Rep. 714."

In *First Natl. Bank of Salem* v. *Salem Capital Flour Mills Co., et al.*, 31 Fed. Rep. 580 (1887), one of the defendants filed a cross-bill against the plaintiff and his co-defendants. The objection was raised that the cross-bill could not be maintained because the citizenship of the defendants was the same. The Court said at page 583:

> "An attempt is also made to show that this cross-bill cannot be maintained on account of the citizenship of the parties thereto, because it makes a case or states a controversy between Stuart on the one hand and McDonald and the flour mills company on the other, all of whom are British subjects.
>
> "Now, nothing is better settled, both on reason and authority, than this. In suits not original but ancillary to litigation already pending in a circuit court of the United States, the citizenship of the parties is wholly immaterial. *Shields* v. *Barrow*, 17 How., 130; *Freeman* v. *Howe*, 24 How., 460; *Cross* v. *De Valle*, 1 Wall., 14; *Railroad Cos.* v. *Chamberlain*, 6 Wall., 748.
>
> "In the last case the court reversed the decree of the circuit court dismissing the cross-bill on the final hearing, because the parties thereto were citizens of the same state; saying that the cross-bill 'was but ancillary to, and dependent upon, the original suit,' and, by a necessary implication, that

the citizenship of the parties in this connection was immaterial. If the citizenship of the parties in the original suit is sufficient to give the court jurisdiction, it has jurisdiction of the cross-bill therein without reference to the citizenship of the parties thereto. A cross-bill is a proper and recognized means of making a defense or asserting the right of a defendant in a suit in equity. It would be intolerable if a party, sued in a national court, was thereby deprived of this right, unless the parties to the cross-bill were such as to give the court jurisdiction in an original suit. In short, the cross-bill and the original suit are but one cause, and jurisdiction of the latter includes the former. *Field* v. *Schieffelin*, 7 Johns., Ch. 252; Story, Eq. Pl., §399."

The foregoing cases were decided prior to the adoption of equity rule No. 30 providing:

> "The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set up any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit both on the original and cross-claims."

Since the adoption of this rule the courts have adhered to their former ruling that, if the bill showed ground of federal jurisdiction, they would entertain a counter-claim relating to the subject-matter of the bill, or necessary to complete disposition of the subject-matter and to the protection of the rights involved, although the counter-claim did not disclose grounds of federal jurisdiction.

In *Cleveland Engineering Co.* v. *Galion Dynamic Motor Truck Co.*, 243 Fed. Rep., 405 (1917), the complainant and defendant were both residents of the same state. The complainant brought a suit for patent infringement. The defendant interposed a counter-claim alleging equitable ownership of the patent and asking for a decree to quiet its title. Complainant moved to strike out the counter-claim on the ground that the Court had not jurisdiction because complainant and defendant were citizens of the same state and because the subject-matter of the counter-claim did not disclose any independent ground of federal jurisdiction, but the Court denied the motion, saying at page 407 that a determination of the counterclaim

> "is necessary in order that complete relief may be given concerning the subject-matter put in litigation by complainant's bill. It is such matter as, according to familiar equity rules, might be made the subject of a cross-bill, and the necessity for pleading same as a counter-claim or cross-bill is in order that complainant may not only be defeated, but that complete relief may be given.
>
> "Manifestly, as a defense, the defendant may deny complainant's title to either or both of the patents sued on; it may, on the hearing, show title in some third party to either or both as a defense; it may also show title in itself to either or both as a defense. In any of these contingencies, complainant's bill should be dismissed. No new or additional evidence in the contingency last assigned would be required to warrant a decree in favor of defendant, pursuant to its cross-bill. It would seem little short of absurd if a court of equity had not power to give complete relief in that event by decreeing that defendant's equitable title should be quieted against complainant's false claim, and that the legal title should be conveyed to it.
>
> "The jurisdiction of this court to entertain the counter-claim depends on the case made by complainant's bill. The bill states a case within the

jurisdiction of the federal court, arising under the patent laws. That jurisdiction is not ousted, or does not fail, because the defendant brings forward a matter of defense arising out of contract, and not within the original jurisdiction of this court. If jurisdiction has attached on the allegations of the bill, this court may proceed to try all questions between the parties, touching that subject-matter, and grant full relief to both parties, even though, on the hearing, the issues touching matters of proper federal jurisdiction are held in fact not to exist, or are decided adversely to complainant's contention."

And also at page 409:

"The counterclaim touches only the matters in question in the original bill; the relief prayed for therein is necessary to a complete determination of the controversy between the parties relating to that subject-matter. The counterclaim does not, in any proper sense, introduce new and distinct matters into the litigation which were not embraced within the original bill. The subject matter is the same, and the only necessity of a prayer for affirmative relief is to enable a decree to be entered in favor of defendant if the defense is made good."

In *Portland Wood Pipe Company* v. *Slick Bros. Const. Co.*, 222 Fed. Rep., 528 (1915), it was held that in a suit by a non-resident of the district to foreclose a mechanics' lien in which the contractor and a sub-contractor, resident citizens of the district, had been made defendants and the sub-contractor asserted a lien upon the property, the Court has jurisdiction to entertain a counterclaim by the contractor against the sub-contractor for moneys advanced and supplies furnished during the progress of the work under the rule that where the Court has jurisdiction of the controversy exhibited by the complaint it may assume jurisdiction to adjudicate incidental issues

raised by cross bills between the defendants regardless of citizenship. The Court said, at page 530:

> "It becomes manifest that the reason which underlies the rule above referred to, by which auxiliary proceedings fall within the jurisdiction of the court regardless of the citizenship of the parties thereto, operates in like manner to extend our jurisdiction to this counterclaim. This rule was established to avoid the necessity of attempting to administer justice by litigating controversies piecemeal, and the reasons for here taking cognizance of Comerford's cross-bill in the absence of diversity of citizenship between the parties are not greater than or different from the reasons for taking cognizance of Slick Bros.' counterclaim interposed in the answer thereto. It is essential to the complete settlement of the controversy initiated by the commencement of the principal suit that we adjudicate both."

The cases cited by appellant, such as *U. S. E. Bolt Co.* v. *Kroncke Hardware Co.*, 234 Fed. Rep., 868 (1916); *Standard Paint Company* v. *Trinidad Asphalt Company*, 220 U. S., 446 (1911); *Geneva Furniture Mfg. Company* v. *Karpen & Co.*, 238 U. S. 254 (1915), are not apposite. In most of these cases the question was whether causes of action for infringement of copyright or trade mark were distinct from a cause of action for unfair competition. We admit that there are essential differences between such causes of action and that they are not related. In no legitimate sense could it be claimed that relief for unfair competition is incidental for relief for patent infringement, but such an admission does not cover the case at bar, in which we claim that relief by injunction against appellant's misuse of our quotations is incidental to the future use of the continuous quotations of New York Cotton Exchange.

POINT IV.

There was sufficient proof to sustain the allegations of appellees' counterclaim that appellant was receiving and using appellees' continuous quotations.

Appellant assigns as error on this appeal:

> "The Court erred in directing the District Court to render a judgment and decree of final injunction in favor of defendants against complainants on the counterclaim, because the allegations of the counterclaim and the evidence in support thereof are wholly insufficient" (R., pp. 73-74, Fifteenth Assignment of Error).

The allegations in the counterclaim that appellant was either purloining the quotations or receiving them from someone who was purloining them are made on information and belief, but the affidavits of Hall, Burmeister, Hale and Irving printed at pages 41-44 of the Record are made on knowledge and show beyond question the facts detailed below.

On February 5th, 1923, appellant was posting on its blackboard the quotations of the New York Cotton Exchange. Members of the appellant Exchange also told Burmeister on this day that appellant was obtaining these quotations (Burmeister, R., pp. 43-44).

The affidavit of Mr. Hale, secretary of the New York Cotton Exchange, corroborates Burmeister's statement that the quotations which he copied from appellant's blackboard were the quotations of the New York Cotton Exchange (R., p. 42).

The affidavits of Irving and Hall show that the telegraph companies are not furnishing these quotations to appellant (R., pp. 41-42).

Paragraph twenty-first of the answer and counterclaim of the New York Cotton Exchange and Paragraph

Eleventh of the answer and counterclaim of the Telegraph Companies charge that appellant is either purloining these quotations or receiving them from some one who is purloining them (R., pp. 22, 38-39).

Appellant in its reply denies that it is purloining the quotations but does not deny in any affidavit or pleading that it is receiving them and in fact claims that they are public property (R., pp. 46-47).

On similar proof injunctions were granted restraining the use of similar quotations in *Board of Trade* v. *McDearmott Commission Co.*, 143 Fed. Rep., 188, 190 (Circ. Ct. W. D. Mo., 1906); *McDermott Commission Co.* v. *Board of Trade*, 146 Fed. Rep., 961, 962 (C. C. A., 8th Circ. 1906); *Board of Trade of Chicago* v. *Hadden-Krull Co.*, 109 Fed. Rep., 705 (Circ. Ct. E. D. Wis., 1901); *Board of Trade* v. *Cella Commission Co.*, 145 Fed. Rep., 28 (C. C. A., 8th Circ. 1906); *Board of Trade* v. *Price*, 213 Fed. Rep., 336 (C. C. A., 8th Circ. 1914); *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S., 236, 1905.

The stipulation that the affidavits of Hall, Irving, Hale and Burmeister should have "the force and effect of testimony in support of the counterclaims" and that the Circuit Court of Appeals "might direct the entry of such final judgment on the counterclaims as in its opinion the court below should enter thereon" (R., p. 70) was made to enable the Circuit Court of Appeals to treat these affidavits for the purpose of entering final judgment thereon as if the affidavits had been testimony on a trial of the counterclaims, and thus to make a final decree disposing of the whole case. This the Circuit Court of Appeals had the power to do in view of the Stipulation.

Thomsen v. *Cayser*, 243 U. S., 66 (1917).

POINT V.

Replying to arguments in appellant's brief.

(a) *The Circuit Court of Appeals had the right to regard the whole record before it in finally disposing of this case.*

Appellant argues, at page 40 of his brief, that in arriving at its decision to dismiss the amended bill the Circuit Court of Appeals erred in considering any facts alleged in the answer; that it should have considered only the allegations of the amended bill. No such error was specifically assigned by appellant and this question is, therefore, not properly before this court.

In the instant case the Circuit Court of Appeals had before it the whole record consisting of the amended bill of complaint, the answers, the reply and certain affidavits. It was called upon to determine two questions: first, was appellant entitled to a preliminary mandatory injunction directing appellees to furnish him with the continuous quotations?; second, was appellee, the New York Cotton Exchange entitled to an injunction prohibiting appellant from receiving or using these same quotations? If it determined the latter question in favor of appellees, it must necessarily have passed upon the first question adversely to appellant, because it could not have decided that appellant should be enjoined from receiving the quotations except on the theory that he was not entitled to them. In determining appellee's right to an injunction the Circuit Court of Appeals had the right to examine the allegations of the answer and the supporting affidavits and had to determine on these whether appellant was entitled to receive the quotations. It seems anomalous to argue that the court could look to the answer in deter-

mining one motion for an injunction which necessarily decided the other motion and yet could not consider these same papers in denying appellant's motion and dismissing the bill. The record here does not present the simple case of a motion to dismiss on appellant's amended bill of complaint alone, but one in all its essential features like a case submitted on bill and answer where all the pleadings are before the court for its final disposition of the issues. If the Circuit Court of Appeals treated the case as one submitted on bill, answer and reply and appellant seeks to reverse its decision on the theory that it should not have so treated it, then he should have assigned this method of dealing with the case as error. But the record contains no such assignment of error.

Furthermore, this treatment of the case is shown to have been in accordance with the intent of the parties. After the Circuit Court of Appeals had rendered its decision and filed its opinion the parties entered into a stipulation, appearing at page 70 of the record, that certain affidavits in the record should have the force and effect of testimony in support of the counterclaims and that the Circuit Court of Appeals might direct the entry of such final judgment on these counterclaims as in its opinion should be rendered, without prejudice to appellant's right to appeal. This stipulation shows an agreement by the parties that the Circuit Court of Appeals should on the whole record determine whether appellees were entitled to a final injunction thus finally disposing of the claims set forth in the bill. The action of the parties, therefore amounted to an assent that the court should dispose of the case on the whole record as though finally submitted on bill, answer, reply and affidavits. In this view of the case appellant should not now be heard to argue that the Circuit Court of Appeals erred in considering the whole of the record before it in its final disposition of the case.

The purpose of the parties in making this stipulation was obviously to obtain a final judgment disposing of all the issues in the case so that an appeal could be taken at once to this court without waiting until after a trial of the issues arising on the counterclaim and another appeal therefrom to the Circuit Court of Appeals. Although appellant was willing that the Circuit Court of Appeals should render final judgment on the question whether appellee should have a final injunction against his using the quotations and that it should look to the whole record to determine this, yet he now argues that it should not look at the whole record in disposing of his claim to the quotations. We submit that, if the whole record was before the court for the purpose of determining finally appellee's right to prevent appellant from receiving the quotations, it was necessarily equally before the court in determining whether the appellant was entitled to receive them. This court should not permit appellant to assume now a position inconsistent with that taken by him in entering into this stipulation. If appellant's contention is sustained he might be entitled to a trial of his claim to receive the quotations, even, although this court should affirm the final judgment on the counterclaim which decides that he is not entitled to them.

Appellant refers to the opinion of the Circuit Court of Appeals to establish his contention that its dismissal of his amended bill is based on facts alleged in the answer, but we submit that the ground for such decision is not found only in the discussion of such facts but in the opinion as a whole. This opinion shows that the court decided that appellant's bill did not show any grounds for equitable relief and if it was correct in this view its decision should be affirmed.

(b) *The New York Cotton Exchange has no illegal monopoly of continuous quotations.*

Under the second group of assignments of error appellant contends that the Circuit Court of Appeals erred in holding that the New York Cotton Exchange has no monopoly of cotton quotations and in holding that it is not unlawful for it to withhold these quotations from persons engaged in interstate buying and selling of cotton. Appellant concedes that these quotations are the property of the New York Cotton Exchange and further concedes that as the owner of them it is under no legal duty to sell them to any particular person (see page 50 of his brief); but he claims that if it sells or gives these quotations to one it must give them to all. In support of this proposition he cites *Patten* v. *U. S.*, 226 U. S. 525 (1912). All that was held in this case, however, was that a corner in cotton to enhance the price was illegal. The Patten case does not hold that if Patten sold to some he must sell to all. Appellant cites no other authority in support of this proposition and he does not claim that the alleged monopoly or discrimination was for the purpose of fixing or maintaining prices. The property right of the Exchange in its quotations is similar to the property rights of a newspaper association in its news. The courts have uniformly held that the Associated Press, United Press and other news-gathering agencies do not have to give their news to non-members and that their property rights in their news are entitled to protection. The courts have also held that the property right of an exchange in quotations is entitled to protection and that it is not bound to sell to all because it sells to some. *Board of Trade* v. *Christie, supra; Matter of Renville, supra.* Even with respect to commodities other than news this court has held that there is no obligation to sell to all because of sales to some. *U. S.* v. *Colgate*, 250 U. S. 300; *Federal Trade*

Commission v. *Curtis Co.*, 260 U. S. 568. We have discussed this question more fully at page 22 of this brief.

(*c*) *The contract between the Exchange and the Telegraph Company was not a sale of the unrestricted right to distribute the continuous quotations but the creation of an agency for their limited distribution.*

Appellant, in support of his third group of assignments of error, at page 53 of his brief argues that the contract between the Exchange and the Telegraph Company was a sale of the continuous quotations and that, therefore, any restriction on their distribution was invalid. We have already discussed very fully in Point I of this brief the purpose and nature of this contract. We shall merely point out here some reasons why it should not be construed as a sale of an unrestricted right in the quotations. The subject matter of the contract is the distribution of the continuous quotations and other quotations, statistics and reports of the Exchange. There are no restrictions on the distribution of any except the continuous quotations. It is apparent that the primary purpose of the Exchange in making this contract was to provide for the distribution of its continuous quotations of transactions carried on in its Board Room among its members and among those who, it felt confident, would not misuse them or permit them to fall into the hands of others who might misuse them.

To guard against this danger the contract contains many provisions designed to keep the control of the distribution of these quotations in the hands of the Exchange. These provisions indicate clearly that neither party intended by this contract to sell or transfer to the Telegraph Company an absolute right in the quotations or an unrestricted title to them so that it could distribute them to any person without the approval of the Exchange.

The contract is printed in full at pages 23 to 34 of the Record and contains the following provisions which negative an intention to sell the quotations to the Telegraph Company:

The Telegraph Company is not permitted to serve the quotations to bucket shops or persons engaged in transactions along those lines; the duty of determining the nature of the business carried on by an applicant for the quotations is not imposed upon the Telegraph Company—the Exchange is made the sole judge of that; the Telegraph Company shall not distribute the quotations to any person until after the Exchange has approved his application (R., pp. 26-27); the Exchange owns the telegraph instruments and employs the operators over which and by whom the quotations are sent to the Telegraph Company (R., pp. 24-25); the Telegraph Company agrees to protect the wires over which the quotations are transmitted from tapping; the Exchange has the right to inspect the rooms of the Telegraph Company and its instruments to see if the quotations are properly protected (R., p. 25). The form of application to be signed by applicants for the quotations is set forth in the contract and provides for a limited use of the quotations only. The applicant agrees not to permit their use in bucket shops, to receive the quotations for his private use only, not to give them to his branch offices or correspondents without obtaining the approval of the Exchange, not to connect his office where the quotations are received by private wire with persons making contracts in cotton without approval of the Exchange, to permit the Exchange to inspect his office to observe the use he is making of the quotations, that the Telegraph Company may discontinue serving him with the quotations at any time, if directed by the Exchange to do so'' (R., pp. 27-29).

In the contract the Telegraph Company further agrees to use its best efforts to prevent persons not approved by the Exchange from receiving the quotations, to furnish

the Exchange with a list of all persons receiving them (R., p. 29). It also agrees that its right to serve the quotations to any person shall cease and determine if the Exchange notifies it to discontinue serving that person with the quotations. It also agrees that the Exchange may conduct the defense of any suit to obtain the quotations (R., p. 30).

All these provisions indicate that the parties to this contract did not intend by it to sell to the Telegraph Company the quotations so that it could resell them to all persons wishing to receive them. Such a construction would be manifestly contrary to the intention of the parties and would nullify many of the express provisions of the contract. The contract is clearly not a grant of an unlimited privilege to the Telegraph Company to distribute the quotations to all. The provisions to which we have referred indicate an intent to keep them under the control of the Exchange. In legal effect this is a contract by which the Telegraph Company agrees to transmit these quotations for the Exchange to persons designated by it and to receive its pay for performing this service from the recipient of the quotations.

The transaction is analogous to the sending of a telegram C. O. D. where the Telegraph Company acts as agent for the sender but collects the charge for transmission from the receiver. The added circumstance that the Telegraph Company finds the transmission of these messages so profitable to it that it pays the sender of the message an annual sum for the privilege of transmitting them and collecting from the receiver does not change the contract from one of agency to a sale, if that is not intended by the parties to it.

In *Matter of Renville*, 46 App. Div. (N. Y.) 37 (see same case quoted more fully at page 21 of this brief) the court construed a contract between the New York Stock Exchange and a telegraph company for the distribution of quotations as an agency contract.

We submit that to construe the contract in the case at bar as a contract of sale would be contrary to the intent of the parties to it as evidenced by its provisions.

(*d*) *Appellant is not entitled to the quotations because they are distributed by a Telegraph Company.*

Appellant argues at page 62 of his brief that a common carrier must serve all alike and that, since these quotations are distributed by a telegraph company, he is entitled to receive them. If we are correct in our contention that the Telegraph Company has not become the owner of the continuous quotations, but acts merely as agent in distributing them, then this argument of appellant falls to the ground. But even if the Telegraph Company had acquired a limited ownership in the quotations, it does not follow that it must give them to everyone. In *Donovan* v. *Penn. R. R. Co.*, 199 U. S., 279 (1906), it was held that a railroad was not obliged to allow all to use its depot as a cab stand because it gave that permission to one, nor was it compelled to permit all to travel on its trains for the purpose of soliciting business from incoming passengers because it granted that privilege to one. There are many activities in which a common carrier may engage which it is under no duty to perform for all. See cases cited at pages 31 to 33 of this brief.

Western Union Telegraph Company v. *Foster*, 224 Mass. 365, cited by appellant on page 63 of his brief, lends some support to his contention. That case decides that a public service commission, given by a local statute jurisdiction over a company engaged in the transmission of intelligence by electricity, may direct it to furnish such intelligence to all without discrimination. That may be the public policy of Massachusetts as laid down in its statutes and expressed by its courts, but this principle

was not followed by this court in *Board of Trade* v. *Christie, supra,* and it is also directly in conflict with *Matter of Renville, supra.*

POINT VI.

The decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

HENRY W. TAFT,
Solicitor for Appellee,
New York Cotton Exchange.

HENRY W. TAFT,
GEORGE COGGILL,
Of Counsel.

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WM. R. STANS

Supreme Court of the United States

OCTOBER TERM, 1925, No. 200

FRANK MOORE, President of The Odd-Lot Cotton Exchange of New York

Appellant

against

THE NEW YORK COTTON EXCHANGE, THE WESTERN UNION TELEGRAPH COMPANY and THE GOLD & STOCK TELEGRAPH COMPANY

Appellees

MEMORANDUM ON BEHALF OF THE APPELLEES THE WESTERN UNION TELEGRAPH COMPANY AND THE GOLD & STOCK TELEGRAPH COMPANY

FRANCIS R. STARK
Solicitor for Appellees
The Western Union Telegraph Company
and the Gold & Stock Telegraph Company

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The position of these appellees is, in all material respects, the same as that of the appellee the New York Cotton Exchange. The remarks in

the brief of counsel for the Cotton Exchange, however, that "Naturally, the only motive of the telegraph companies was profit, and the more customers, the more profit" (page 16) and that "The only person having a real interest in preventing the misuse of the quotations was the exchange" (page 18) should perhaps be supplemented by the following statement:

The Western Union and the Gold & Stock, willing and anxious though they are at all times to increase their business in every legitimate way, earnestly believe that the policy which is sought to be effectuated by the contract with the Cotton Exchange is in the highest degree desirable as a matter of general public interest. If the question were still an open one, which we have assumed that it is not since *Board of Trade* v. Christie Company, 198 U. S. 236, it is our view that a holding that this contract violates the law would be a serious misfortune, if not a calamity. While it might result immediately in a slightly increased revenue for these companies, in the long run we have found that our best interests do not diverge widely in large matters from the public interest, and we are no less anxious than the Cotton Exchange that these arrangements shall continue to be upheld. We regard the matter as of the greater importance because, under the authorities, it is not perhaps entirely clear that a telegraph company can discriminate between applicants when the telegraph company itself is the collector and owner of the news; and, as counsel for the Cotton Exchange have

well pointed out (page 29), a valid reason for denying an application may often exist and still be difficult to prove. That it might be necessary for a telegraph company collecting and owning the quotations to find the proof, and that no such necessity exists when the ownership remains in the Cotton Exchange, is the real reason for these contracts.

Respectfully submitted,

FRANCIS R. STARK,
Solicitor for Appellees
The Western Union Telegraph Company
and the Gold & Stock Telegraph Company.